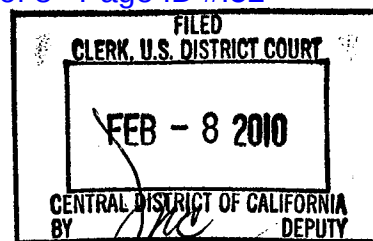


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DATED: Feb. 8, 2010

Melissa Lash
DEPUTY CLERK



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

GREGORY SMITH,

Petitioner,

v.

MRS. GONZALES, Warden, California
Men's Colony SP,

Respondent.

Case No. CV 10-00636 PSG (AN)

**ORDER TO SHOW CAUSE RE
DISMISSAL OF PETITION FOR
WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY AS
TIME-BARRED**

I. BACKGROUND

Before the Court is a Petition for Writ of Habeas Corpus ("Petition") brought by Gregory Smith ("Petitioner"), a state prisoner proceeding *pro se*. The Petition is brought pursuant to 28 U.S.C. § 2254 and raises two claims directed at Petitioner's 2005 conviction of carjacking, with a finding of three prior serious felonies and two prison terms, which he sustained following a jury trial in the Los Angeles County Superior Court (case no. TA079382). For the reasons set forth below, Petitioner is ordered to show cause why his Petition should not be dismissed with prejudice because it is time-barred.

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II. DISCUSSION

A. Standard of Review

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, requires a judge to “promptly examine” a habeas petition and “[i]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner.” Local Rule 72-3.2 of this Court also provides “[t]he Magistrate Judge promptly shall examine a petition for writ of habeas corpus, and if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief, the Magistrate Judge may prepare a proposed order for summary dismissal and submit it and a proposed judgment to the District Judge.” C.D. Cal. R. 72-3.2. Further, an untimely habeas petition may be dismissed *sua sponte*, however, the district court must give the petitioner adequate notice and an opportunity to respond before doing so. *Day v. McDonough*, 547 U.S. 198, 209-10, 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

B. Statute of Limitations

The Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which establishes a one-year statute of limitations for state prisoners to file a habeas petition in federal court, because the Petition was filed after April 24, 1996, AEDPA’s enactment date. 28 U.S.C. § 2244(d)(1); *see Lindh v. Murphy*, 521 U.S. 320, 327-37, 117 S. Ct. 2059 (1997). In most cases, the limitations period begins to run from “the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

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1 The face of the Petition establishes that Petitioner sustained his underlying
 2 conviction on September 29, 2005, and that he was sentenced on December 20, 2005.
 3 (Pet. at 2.) The Petition and relevant state court records^{1/} also establish that the
 4 California Court of Appeal, Second Appellate District, Division Three, denied his
 5 direct appeal on January 23, 2007 (case no. B189219), and the California Supreme
 6 Court denied his petition for review of that decision on March 28, 2007 (case no.
 7 S150443). (Pet. at 2-3; California appellate records.) Neither the Petition nor state
 8 court records establish that Petitioner filed a petition for certiorari with the United
 9 States Supreme Court. Therefore, for purposes of AEDPA's limitations period,
 10 Petitioner's judgment became final on June 26, 2007, the ninetieth day after the state
 11 high court denied his petition for review and the last date for him to file a petition for
 12 certiorari with the Supreme Court. *Bowen v. Roe*, 188 F.3d 1157, 1159 (9th Cir.
 13 1999). The statute of limitations then started to run the next day, June 27, 2007, and
 14 ended a year later on June 26, 2008. 28 U.S.C. § 2244(d)(1)(A); *see also Patterson*
 15 *v. Stewart*, 251 F.3d 1243, 1245-47 (9th Cir. 2001) (the limitations period begins to
 16 run on the day after the triggering event pursuant to Fed. R. Civ. P. 6(a)). Petitioner
 17 did not sign, date, and constructively file his pending Petition in this matter until
 18 January 26, 2010^{2/} -- 579 days (approximately 1 year, 7 months) after the expiration
 19

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 21 ^{1/} The Court takes judicial notice of Petitioner's records in the state appellate
 22 courts, which are available on the Internet at <http://appellatecases.courtinfo.ca.gov>.
 23 *See Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002) (federal courts may take
 judicial notice of relevant state court records in federal habeas proceedings).

24 ^{2/} Pursuant to the "mailbox rule," a *pro se* prisoner's habeas petition is
 25 deemed to be filed on the date the prisoner delivers the petition to prison authorities
 26 for mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379
 27 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001). The pending Petition
 28 was filed by the Clerk on January 28, 2010, however, for purposes of the timeliness
 analysis, the Court gives Petitioner the benefit of the doubt by assuming he
 (continued...)

1 of the limitations period.

2 Accordingly, absent some basis for tolling or an alternative start date to
3 AEDPA's limitations period under 28 U.S.C. § 2244(d)(1), the pending Petition is
4 time-barred.

5 **C. Statutory Tolling**

6 AEDPA includes a statutory tolling provision that suspends the limitations
7 period for the time during which a "properly-filed" application for post-conviction or
8 other collateral review is "pending" in state court. 28 U.S.C. § 2244(d)(2); *Waldrip*
9 *v. Hall*, 548 F.3d 729, 734 (9th Cir. 2008); *Bonner v. Carey*, 425 F.3d 1145, 1148 (9th
10 Cir. 2005). An application is "pending" until it has achieved final resolution through
11 the state's post-conviction procedures. *Carey v. Saffold*, 536 U.S. 214, 220, 122 S. Ct.
12 2134 (2002). The limitations period is not tolled between the time a final decision is
13 issued on direct state appeal and the time a state collateral challenge is filed because
14 there is no case "pending" during that interval. *Thorson v. Palmer*, 479 F.3d 643, 646
15 (9th Cir. 2007); *Nino v. Galaza*, 183 F.3d 1003, 1006 (9th Cir. 1999). On collateral
16 review, however, "intervals between a lower court decision and a filing of a new
17 petition in a higher court," when reasonable, fall "within the scope of the statutory
18 word 'pending'" thus tolling the limitations period. *Saffold*, 536 U.S. at 221, 223;
19 *Evans v. Chavis*, 546 U.S. 189, 192, 126 S. Ct. 846 (2006) (*citing Saffold*).

20 Further, to qualify for statutory tolling during the time the petitioner is pursuing
21 collateral review in the state courts, his *first* state habeas petition must be
22 constructively filed *before*, not after, the expiration of AEDPA's one-year limitations
23 period. *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) ("[S]ection 2254
24 does not permit the reinitiation of the limitation period that has ended before the state
25

26 ^{2/} (...continued)

27 constructively filed the Petition on January 26, 2010, the date he signed the Petition
28 and his accompanying proof of service. (Pet. at 8, attached Proof of Service.)

petition was filed”); *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) (stating that filing of state petition after AEDPA’s one-year time period has elapsed bars federal habeas review); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (“A state-court petition [] that is filed following the expiration of the limitations period cannot toll that period because there is no period remaining to be tolled”).

The face of the Petition indicates Petitioner filed a habeas petition with the trial court on August 29, 2008, and that petition was denied the same day. (Pet. at 4.) Further, the face of the Petition and state court records establish Petitioner also currently has a habeas petition pending in the California Supreme Court (case no. S180044), which was constructively filed on January 26, 2010.^{3/} (Pet. at 8; California appellate records). However, Petitioner is not entitled to statutory tolling for either of his state habeas petitions because they were both filed after the limitations period expired on June 26, 2008. *See Jiminez*, 276 F.3d at 482; *Webster*, 199 F.3d at 1259; *Moore v. Crosby*, 321 F.3d 1377, 1381 (11th Cir. 2003) (a state application for post-conviction relief does not revive the one-year limitations period if it has already expired). Therefore, the face of the Petition, attached exhibits, and state court records establish that Petitioner is not entitled to any statutory tolling of the limitations period.

D. Alternative Start of the Statute of Limitations

1. State-Created Impediment

In rare instances, AEDPA provides that its one-year limitations period shall run from “the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action.” 28 U.S.C. § 2244(d)(1)(B). Asserting that the statute of limitations was delayed by a state-created impediment requires a showing of a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th

^{3/} The mailbox rule also applies to *pro se* state habeas petitions. *Stillman v. Lamarque*, 319 F.3d 1199, 1201 (9th Cir. 2003).

1 Cir. 2002). Thus, a claim of delayed accrual under this provision “must satisfy a far
2 higher bar than that for equitable tolling.” *Ramirez v. Yates*, 571 F.3d 993, 1000 (9th
3 Cir. 2009). Petitioner’s filings do not set forth any facts that show he is entitled to
4 relief under this provision.

5 **2. Newly Recognized Constitutional Right**

6 AEDPA provides that, if a claim is based upon a constitutional right that is
7 newly recognized and applied retroactively to habeas cases by the United States
8 Supreme Court, the one-year limitations period begins to run on the date which the
9 new right was initially recognized by the United States Supreme Court. 28 U.S.C. §
10 2244(d)(1)(C). Petitioner’s filings do not set forth any facts that show he is entitled
11 to relief under this provision.

12 **3. Discovery of Factual Predicate**

13 AEDPA also provides that, in certain cases, its one-year limitations period shall
14 run from “the date on which the factual predicate of the claim or claims presented
15 could have been discovered through the exercise of due diligence.” 28 U.S.C. §
16 2244(d)(1)(D). Petitioner’s filings do not set forth any facts that show he is entitled
17 to relief based upon a late discovery of the factual predicate.

18 **E. Equitable Tolling**

19 The United States Supreme Court has not yet decided whether AEDPA’s
20 limitations period allows for equitable tolling but it has assumed without deciding that
21 it is available where the parties have agreed. *Lawrence v. Florida*, 549 U.S. 327, 336,
22 127 S. Ct. 1079 (2007) (“We have not yet decided whether § 2244(d) allows for
23 equitable tolling.”); *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005)
24 (“We have never squarely addressed the question whether equitable tolling is
25 applicable to AEDPA’s statute of limitations”).

26 Although the Ninth Circuit has found equitable tolling is available, *Harris v.*
27 *Carter*, 515 F.3d 1051, 1054 n.4. (9th Cir. 2008), it has cautioned, “[e]quitable tolling
28 is justified in few cases,” and that “the threshold necessary to trigger equitable tolling

1 [under AEDPA] is very high, lest the exceptions swallow the rule.” *Spitsyn v. Moore*,
2 345 F.3d 796, 799 (9th Cir. 2003); *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir.
3 2002) (same). “This high bar is necessary to effectuate the ‘AEDPA’s statutory
4 purpose of encouraging prompt filings in federal court in order to protect the federal
5 system from being forced to hear stale claims.” *Mendoza v. Carey*, 449 F.3d 1065,
6 1068 (9th Cir. 2006). Further, “[e]quitable tolling determinations are ‘highly fact-
7 dependent.’” *Id.* The petitioner “bears the burden of showing that equitable tolling
8 is appropriate.” *Espinoza-Matthews v. California*, 432 F.3d 1021, 1026 (9th Cir.
9 2005).

10 Moreover, in *Pace*, the Supreme Court clearly established that “a litigant
11 seeking equitable tolling bears the burden of establishing two elements: (1) that he
12 has been pursuing his rights diligently, and (2) that some extraordinary circumstance
13 stood in his way.” *Pace*, 544 U.S. at 418; *Lawrence*, 549 U.S. at 336. *Pace*’s
14 diligence prong requires the petitioner to show he engaged in reasonably diligent
15 efforts to file his § 2254 petition throughout the time the limitations period was
16 running. *Mendoza*, 449 F.3d at 1070; *see also Smith v. McGinnis*, 208 F.3d 13, 17 (2d
17 Cir. 2000) (stating that equitable tolling requires a showing that “the party seeking
18 equitable tolling must have acted with reasonable diligence throughout the period he
19 seeks to toll” and “extraordinary circumstances prevented him from filing his petition
20 on time”). The petitioner must also demonstrate that he exercised reasonable diligence
21 in attempting to file his habeas petition after the extraordinary circumstances began
22 otherwise the “link of causation between the extraordinary circumstances and the
23 failure to file [is] broken.” *Spitsyn*, 345 F.3d at 802. *Pace*’s “extraordinary
24 circumstances” prong requires the petitioner to “additionally show that the
25 extraordinary circumstances were the cause of his untimeliness, and that the
26 extraordinary circumstances made it impossible to file a petition on time.” *Ramirez*,
27 571 F.3d at 997 (internal quotations and citations omitted). Petitioner’s filings do not
28 set forth any facts that show he is entitled to equitable tolling.

ORDER

Based on the foregoing, the Court finds the Petition is untimely. Accordingly, Petitioner shall have until **February 22, 2010**, to file a written response and show cause why his Petition should not be dismissed with prejudice because it is time-barred. In responding to this Order, Petitioner must show by declaration and any exhibits what, if any, factual or legal basis he has for claiming that the Court's foregoing analysis is factually or legally incorrect, or that AEDPA's one-year statute of limitations should be tolled, or the start date extended. If Petitioner contends he is entitled to tolling because of a lack of access to the prison law library due to a purported lockdown or some other state-created impediment, his written response must be supported by a declaration from the warden or prison librarian verifying that the law library and library materials were unavailable throughout the relevant time period because of the lockdown or other stated reason. Petitioner must also show that, during the time access to the prison law library was allegedly unavailable, he made requests for legal materials to be brought to his cell and those requests were denied.

Petitioner is warned that if a timely response to this Order is not made, Petitioner will waive his right to do so and the Court will, without further notice, issue an order dismissing the Petition, with prejudice, as time-barred. Further, if Petitioner determines the Court's above analysis is correct and the Petition is clearly time-barred, he should file a Request For Voluntary Dismissal of this action pursuant to Fed. R. Civ. P. 41(a)(1) in lieu of a response to this Order.

IT IS SO ORDERED.

DATED: February 8, 2010


ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE